Supreme Court, U.S.
FILED
JUN 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1571

In The

Supreme Court of the United States

October Term, 1988

THOMAS H. DeLORENZO, MARLENE S. DeLORENZO AND HILLS OF WARREN,

Petitioners,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For Writ Of Certiorari To The New Jersey Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GEORGE L. ROMANACCE
RUBIN, DOLGOFF & ROMANACCE, P.C.
624 Bloomfield Avenue
Bloomfield, New Jersey 07003
(201) 743-9292

Attorneys for Petitioners

Dated: June 5, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether a State Court commits an unconstitutional taking where it awards private property to a corporation which has a State agency as receiver, and where the State agency is the beneficiary of such award.

Whether there exists any independent and adequate State ground supporting the decision of the trial court to divest Petitioners of their real property.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Argument 1

THE TRIAL COURT'S JUDGMENT RESULTED IN PETITIONERS' PROPERTY BEING AWARDED TO THE STATE, AND WAS NOT SUPPORTED BY ANY INDEPENDENT AND ADEQUATE STATE GROUND..... 1

A. *The Trial Court's Judgment Resulted In Petitioners' Property Being Awarded To The State...* 2

B. *No Recognized Legal Or Equitable State Law Doctrine Implies That Petitioners Be Divested Of The Subject Property.* 4

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

Blum v. Yaretsky, 457 U.S. 991 (1982) 4

Corporation of Presiding Bishop v. Hodel, 830 F.2d 374 (D.C. Cir. 1987) 8

Dunkin' Donuts v. Middletown Donut Corporation, 100 N.J. 166, 495 A.2d 66 (1985) 6, 7

Hughes v. State of Washington, 389 U.S. 290 (1967) 8

Lugar v. Edmonton Oil Co., 457 U.S. 922 (1982) 4

Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977), *aff'd.*, 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902 (1986) 8

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 4

Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978) 8

Tulsa Professional Collection Services v. Pope, ___ U.S. ___, 108 S.Ct. 1340 (1988) 4

STATUTES

N.J.S.A. 13:1E-100, *et seq.* (Supp. 1989) 2

N.J.S.A. 13:1E-105 (Supp. 1989) 2

N.J.S.A. 13:1E-106 (Supp. 1989) 2

N.J.S.A. 13:1E-111 (Supp. 1989) 2

ARGUMENT

THE TRIAL COURT'S JUDGMENT RESULTED IN PETITIONERS' PROPERTY BEING AWARDED TO THE STATE, AND WAS NOT SUPPORTED BY ANY INDEPENDENT AND ADEQUATE STATE GROUND.

Petitioners argued in their Petition for Writ of Certiorari that the trial court's "backwards" application of the corporate opportunity doctrine constituted a radical and unforseeable change in state law which resulted in Petitioners' property being awarded to the State without just compensation or due process. Petitioners cited several decisions which either hold or imply that a court commits an unconstitutional taking where it effects a radical change in state law which results in private property being awarded to the State. (Petition, at 9-11).

Respondent's Brief in Opposition raises two points not previously addressed. First, Respondent asserts that the New Jersey courts did not actually award property to the State since, as Respondent suggests, the New Jersey Department of Environmental Protection (NJDEP) acted merely as a receiver of High Point Sanitation Company. (Respondent's Brief, at 11-13). Second, Respondent alleges an adequate state ground justifying the Court's holding, independent of the corporate opportunity issue, citing "time honored equitable principles". (Respondents' Brief, at 13). Each of these points will be addressed separately below.

A. The Trial Court's Judgment Resulted In Petitioners' Property Being Awarded To The State.

In attempting to avoid the implication that the trial court's decision resulted in the DeLorenzos' property being transferred to the State, Respondent highlights the fact that the NJDEP was appointed receiver of High Point. Respondent argues that since the State was merely acting as a receiver for the corporation, "title to the 'Round Valley' property was transferred to *High Point* and not to the NJDEP or the State." (Respondent's Brief, at 12-13) (Emphasis in original).

Despite this characterization by Respondent, the NJDEP cannot fairly assert that its involvement in this decision is only as a disinterested receiver. In 1981, New Jersey enacted the Sanitary Landfill Facility Closure and Contingency Fund Act. N.J.S.A. 13:1E-100, *et seq.* (Supp. 1989). That Act created the Sanitary Landfill Contingency Fund to be administered by the NJDEP. *Id.*, 13:1E-105. Pursuant to statute, "the fund shall be strictly liable for all direct and indirect damages, no matter by whom sustained, proximately resulting from the operations or closure of any sanitary landfill." *Id.*, 13:1E-106. The liability of the fund extends not only to the restoration of property and natural resources, but also to the costs of clean up and monitoring of landfills which present a "threat to the public health, safety and welfare of the citizens of this State . . . ." *Id.*, 13:1E-106(a)(1) through (4). The Act presupposes a right of subrogation against the owner or operator of a sanitary landfill facility. *Id.*, 13:1E-111.

In essence, the state fund administered by the NJDEP is strictly liable for expenses relating to clean up of this landfill facility, and any property the State acquires in the name of the corporation will go to the NJDEP to lessen that obligation. Thus, awarding the Round Valley property to the corporation has the direct effect of reducing the obligations of the State relating to closing the landfill. The trial court recognized that the State would be the true beneficiary if the Round Valley property were awarded to High Point. In fact, the Court relied heavily on that knowledge in deciding to utilize a novel doctrine to divest Petitioners of the property. As the trial court noted, the corporation only has $400,000 to apply to the estimated $8 million necessary to close the landfill, leaving "a very substantial shortfall *which will probably have to be made up from public funds*". (App. 16) (emphasis added). The trial court went on to note that the northern tract, because of its value on the commercial market, "would generate funds which could then be applied to the closure of the landfill." (App. 17). The court pointed out that declaring the property "as an asset of the corporation would be pragmatically beneficial to the Commissioner [of the NJDEP] with respect to his responsibility in closing the landfill . . . ." (App. 16-17).

In sum, Respondent cannot avoid the fact that, in substance, the Round Valley property was being given to the NJDEP. It is true that in this case the transfer was in two steps, with the Petitioners first providing the property to High Point, and then High Point providing same for use by the State. The trial court, however, made sure that both steps would take place at once, stating in paragraph 1 of its Judgment that the Petitioners are to transfer

the property to High Point, and then in paragraph 3 of the same Judgment ordering that High Point make the property available to the Commissioner of the NJDEP. (App. 3).

This Court should not accept the inference that because the subject property was technically awarded to High Point, it was not taken by the State. It has been repeatedly recognized in due process decisions that the fact that a State may operate through a private entity does not mean that there is no State action. As was recently noted in *Tulsa Professional Collection Services v. Pope*, ___ U.S. ___, 108 S.Ct. 1340 (1988), "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found". *Id.* at ___, 108 S.Ct. at 1345, *citing, Lugar v. Edmonton Oil Co*, 457 U.S. 922 (1982); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). *See also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (State may be held responsible for private decision where it has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State").

B. No Recognized Legal Or Equitable State Law Doctrine Implies That Petitioners Be Divested Of The Subject Property.

In holding that Petitioners were to be divested of the Round Valley Property, the trial court relied solely on what it referred to as "a backwards application of the doctrine of corporate opportunity." (App. 8). The Petition

before this Court fully sets out that in applying the corporate opportunity doctrine to this Case, the trial court disregarded important requirements long accepted as necessary to invoking the doctrine. (Petition, at 12-13). In effect, the trial court radically and unforseeably altered the doctrine in making it applicable to these facts.

Because the Appellate Division vaguely noted that the result might be justified by some other State ground, the Petitioners also addressed whether any other theory implies the result obtained by the trial court. The Petition argued that the New Jersey courts could not justify this holding on the basis of the corporate statutes, or the equitable doctrines of "alter ego" and "piercing the corporate veil". (Petition, at 15-17).

Respondent's Brief does not cite any equitable theory in alleging an independent and adequate State ground. Rather, it simply posits that the Judgment "was based on time-honored equitable principles", and notes that "courts of equity are endowed with the flexibility to adapt proceedings and remedies to the circumstances of each case". (Respondent's Brief, at 13). The implication of the NJDEP is that equity courts have discretion to fashion relief even though there may have been no wrong under accepted equitable doctrines.

While it is a truism that courts of equity have substantial discretion to fashion a remedy, this presupposes that a party has committed some wrong pursuant to accepted equitable doctrines. "Corporate opportunity" is an equitable doctrine, as are the doctrines of "alter ego" and "piercing the corporate veil". In fact, these doctrines were addressed in the Petition because they are the only

three which might conceivably imply that the DeLorenzos should be divested of their individually owned property in order to satisfy corporate obligations. However, as the Petitioners argue, none of these doctrines would be applicable to these facts without being applied in some radical and unforeseen way.

In essence, Respondent's statement that equity will not suffer a wrong without a remedy begs the question. But for the trial court's novel application of the corporate opportunity doctrine, there would have been no wrong under State law warranting divestment of the DeLorenzos' property.

The New Jersey Supreme Court has itself recognized the limitations of a court of equity in granting relief where no wrong was committed under established doctrines. In *Dunkin' Donuts v. Middletown Donut Corporation*, 100 N.J. 166, 495 A.2d 66 (1985), the franchisee of a doughnut shop was found to have breached the franchise agreement. *Id.* at 173, 495 A.2d at 69. Although the franchise agreement provided that in such case the rights of the franchisee would terminate, the trial court fashioned an alternative remedy based on "equitable considerations" to replace the "disproportionately harsh" remedy set forth in the contract. *Id.* at 173, 495 A.2d at 69. The trial court ordered that the franchisee be paid $115,000 upon his surrender of the franchises. *Id.* at 174, 495 A.2d at 69.

The New Jersey Supreme Court reversed, finding that the court below had "altered the terms of the franchise agreements, slighted a substantial body of franchise law and trespassed on the franchisor's valid rights at

law". *Id.* at 170, 495 A.2d at 68. The *Dunkin' Donuts* court first discussed the prior law relating to franchise contracts, and finding no basis for the trial court's remedy, went on to state:

> Finding nothing in the general body of franchise law to indicate that [the franchisee] should receive value for his franchise as a condition of termination, we next examine whether the Chancery Division can nonetheless require such relief on the basis of its authority as a court of equity. We have uncovered no equitable maxim or other guiding principle that would support the court's disregard of the franchise agreements and modifications of the general body of franchise law discussed above. Although the remedy imposed by the Court was undoubtedly well-intentioned, naked references to "equitable considerations" are not sufficient support for the type of "creativity" unleashed here. We are not disposed to put all contractual rights at risk in the name of equity.

Id. at 181-82, 495 A.2d at 74.

The court went on to note that "equity will generally conform to established rules and precedents, and will not change or unsettle rights that are created and defined by existing legal principles". *Id.* at 183, 495 A.2d at 74. In rejecting the trial court's use of "equitable considerations", *Dunkin' Donuts* relied on the equitable maxim that "equity follows the law", and on "the settled principle that equity will grant relief in situations involving fraud, accident, mistake, duress, or undue influence, none of which have been established against [the franchisor]." *Id.* at 183-84, 495 A.2d at 74-75.

Given the *Dunkin' Donuts* decision, the assertion of the NJDEP that "equitable principles" justify the trial

court's decision must be rejected. In New Jersey, courts of equity must conform their decisions to equitable doctrines and maxims and cannot simply rely on undefined "equitable considerations".

Counsel for the Petitioners is not suggesting that State law doctrines must remain immutable, or that State courts are prohibited from progressively revising doctrines to meet the changing needs of society. Rather, counsel is seeking to have this Court recognize the rule suggested by Mr. Justice Stewart in *Hughes v. State of Washington*, 389 U.S. 290, 297-98 (1967) (Stewart, J., concurring), and applied in *Sotomura v. County of Hawaii*, 460 F.Supp. 473 (D. Hawaii 1978), and *Robinson v. Ariyoshi*, 441 F.Supp. 559 (D. Hawaii 1977), *aff'd.*, 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902 (1986). That rule would provide a remedy only where a State court radically and unforeseeably effects a change in State law which results in an individual's property being awarded to the State.* In substance, the rule would protect an individual from changes in State law which appear to be motivated by a perceived need of the State to obtain a particular piece of property without just compensation.

---

* It should be noted that even if the State were not the beneficiary of the property, there would still remain open the issue of whether the trial court violated Petitioner's due process rights through gross or arbitrary error in applying State law doctrines. *See Corporation of Presiding Bishop v. Hodel*, 830 F.2d 374, 381 (D.C. Cir. 1987).

CONCLUSION

For the reasons stated above, and in the Petition for Writ of Certiorari, Petitioners respectfully request that this Court issue a Writ of Certiorari to review the decisions of the New Jersey Courts.

Respectfully submitted,

GEORGE L. ROMANACCE, ESQ.
RUBIN, DOLGOFF & ROMANACCE, P.C.
624 Bloomfield Avenue
Bloomfield, N.J. 07003
(201) 743-9292
Attorneys for Petitioners